

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

[CORRECTED COPY]

77-1286

To be argued by
THOMAS E. ENGEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1286

In the Matter of
the Grand Jury Subpoena Served upon
PEDRO ARCHULETA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

THOMAS E. ENGEL,
FREDERICK T. DAVIS,
*Assistant United States Attorneys
Of Counsel.*

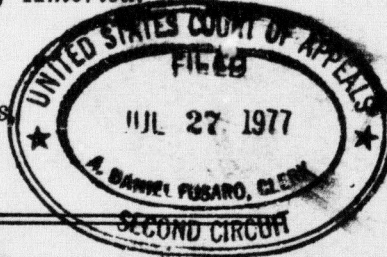


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
A. The Grand Jury Investigation	2
B. The Archuleta Subpoena	5
1. The Motion to Quash	5
2. The Electronic Surveillance Contentions	10
C. The Proceedings Before Judge Brieant	11
1. The Court's Instructions to the Grand Jury	11
2. The Invocation of the Privilege and the Grant of Use Immunity	14
3. The Protective Order	15
4. The Refusal to Answer	16
D. The Contempt Proceedings	18
ARGUMENT:	
POINT I—The Government Adequately Denied that the Questioning of Archuleta Before the Grand Jury Was the Product of Electronic Surveillance	22
POINT II—Archuleta Has No Standing to Attack the Composition of the Grand Jury	31
A. The Contemnor Has No Statutory Standing	32
B. The Contemnor May Not Challenge the Composition of the Grand Jury on Constitutional Grounds	34

	PAGE
POINT III—Archuleta's Other Claims Are Frivolous	37
A. The Subpoena Was Not Issued to Harass Archuleta	40
B. The Order of Immunity Adequately Protects Archuleta	43
C. The Asserted Leaks of Information to the Newspapers Do Not Excuse Archuleta's Refusal to Testify	45
D. Fingerprinting and Photographing Archuleta Deprived Him of No Substantial Rights ..	47
CONCLUSION	49

TABLE OF CASES

<i>Blair v. United States</i> , 250 U.S. 273 (1919)	38
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972)	38
<i>Henderson v. Morgan</i> , 426 U.S. 637 (1976)	34
<i>In Re Biaggi</i> , 478 F.2d 489 n.1 (2d Cir. 1973)	46
<i>In Re Buscaglia</i> , 518 F.2d 77 (2d Cir. 1975)	26
<i>In Re Grand Jury Investigation (Testa)</i> , 486 F.2d 1013 (3d Cir. 1973), <i>cert. denied sub nom. Testa v. United States</i> , 417 U.S. 919 (1974)	29
<i>In Re Grand Jury Proceedings (Schofield I)</i> , 486 F.2d 85 (3d Cir. 1973)	40
<i>In Re Grusse</i> , 402 F. Supp. 1232 (D. Conn. 1975) ..	29
<i>In Re Lopreato</i> , 511 F.2d 1150 (1st Cir. 1975)	40
<i>In Re Millow</i> , 529 F.2d 770 (2d Cir. 1976)	25
<i>In Re Mintzer</i> , 511 F.2d 471 (1st Cir. 1974)	26

	PAGE
<i>In Re Nevitt</i> , 117 F. 448 (8th Cir. 1902)	37
<i>In Re Pilliteri</i> , 420 F. Supp. 913 (W.D. Pa. 1976) ..	42
<i>In Re Quinn</i> , 525 F.2d 222 (1st Cir. 1975)	30
<i>In Re Santiago</i> , 533 F.2d 727 (1st Cir. 1976)	38
<i>In Re Vigil</i> , 524 F.2d 209 (10th Cir. 1975)	24
<i>In the Matter of Maria T. Cueto and Faisa Nemikin,</i> <i>Grand Jury Witnesses</i> , 554 F.2d 14 (2d Cir. 1977)	4, 28, 41, 42
<i>In the Matter of Wood</i> , 430 F. Supp. 41 (S.D.N.Y. 1977)	3, 41
<i>Largella v. Commissioner</i> , 545 F.2d 818 (2d Cir. 1976)	44
<i>Kastigar v. United States</i> , 406 U.S. 441 (1972)	43
<i>Murphy v. Waterfront Commission</i> , 378 U.S. 52 (1964)	43
<i>Otero v. New York City Housing Authority</i> , 344 F. Supp. 737 (S.D.N.Y. 1972), <i>rev'd on other</i> <i>grounds</i> , 484 F.2d 1122 (2d Cir. 1973)	48
<i>People ex rel. Munsell v. The Court of Oyer and</i> <i>Terminer of the City of New York</i> , 101 N.Y. 274 (1886)	37
<i>Shillitani v. United States</i> , 384 U.S. 364 (1966) ..	33, 37
<i>Test v. United States</i> , 420 U.S. 28 (1975)	33
<i>United States v. Alter</i> , 482 F.2d 1016 (9th Cir. 1973)	30
<i>United States v. American Honda Motor Company</i> , 273 F. Supp. 810 (N.D. Ill. 1967)	42
<i>United States v. Arnett</i> , 342 F. Supp. 1255 (D. Mass. 1970)	39

	PAGE
<i>United States v. Bianco</i> , 534 F.2d 501 (2d Cir. 1976), <i>cert. denied</i> , — U.S. — ()	44
<i>United States v. Briggs</i> , 366 F. Supp. 1356 (N.D. Fla. 1973)	39
<i>United States v. Calandra</i> , 414 U.S. 338 (1974)	38
<i>United States v. Catalano</i> , 491 F.2d 268 (2d Cir.), <i>cert. denied</i> , 419 U.S. 825 (1974)	43
<i>United States v. Capra</i> , 372 F. Supp. 609 (S.D.N.Y. 1974), <i>rev'd in part on other grounds</i> , 501 F.2d 267 (2d Cir. 1974)	48
<i>United States ex rel. Chestnut v. Criminal Court of the City of New York</i> , 442 F.2d 611 (2d Cir.), <i>cert. denied</i> , 404 U.S. 856 (1971)	34, 35, 36, 37
<i>United States v. Cleary</i> , 265 F.2d 459 (2d Cir.), <i>cert. denied</i> , 360 U.S. 936 (1959)	40
<i>United States v. D'Andrea</i> , 495 F.2d 1170 (3d Cir.), <i>cert. denied</i> , 419 U.S. 855 (1974)	26
<i>United States v. Dellinger</i> , 472 F.2d 340 (7th Cir. 1972), <i>cert. denied</i> , 410 U.S. 970 (1973)	39
<i>United States v. Dionisio</i> , 410 U.S. 1 (1972)	38, 47
<i>United States v. Doe</i> , 457 F.2d 895 (2d Cir. 1972), <i>cert. denied</i> , 410 U.S. 941 (1973)	40, 41, 48
<i>United States v. Duncan</i> , 456 F.2d 1401 (9th Cir.), <i>vacated on other grounds</i> , 409 U.S. 814 (1972)	37, 38
<i>United States v. Dunham Concrete Products</i> , 475 F.2d 1241 (5th Cir.), <i>cert. denied</i> , 414 U.S. 832 (1973)	47
<i>United States v. Grusse</i> , 515 F.2d 157 (2d Cir. 1975)	25, 26, 29
<i>United States v. Hinton</i> , 543 F.2d 1002 (2d Cir. 1976), <i>cert. denied</i> , — U.S. — (1977)	44

	PAGE
<i>United States v. Hoffa</i> , 349 F.2d 20 (6th Cir. 1965), aff'd., 385 U.S. 293 (1966)	47
<i>United States v. Kurzer</i> , 534 F.2d 511 (2d Cir. 1976)	44
<i>United States v. Mara</i> , 410 U.S. 19 (1972)	48
<i>United States v. McDaniels</i> , 370 F. Supp. 298 (E.D. La. 1973), aff'd., sub nom. <i>United States v.</i> <i>Goff</i> , 509 F.2d (5th Cir.), cert. denied, 423 U.S. 857 (1975)	39
<i>United States v. Moeller</i> , 402 F. Supp. 49 (D. Conn. 1975)	26
<i>United States v. Nemes</i> , Dkt. No. 76-1584 slip op. 3509 (2d Cir. May 16, 1977)	43, 44
<i>United States v. Nixon</i> , 418 U.S. 683 (1974)	41
<i>United States v. Schiavo</i> , 375 F. Supp. 475 (E.D. Pa.), aff'd., 506 F.2d 1053 (3d Cir. 1974)	47
<i>United States v. See</i> , 505 F.2d 845 (9th Cir.), cert. denied, 420 U.S. 992 (1974)	25, 26, 30
<i>United States v. Smith</i> , 393 F.2d 687 (6th Cir.), cert. denied, 393 U.S. 885 (1968)	48
<i>United States v. Smyth</i> , 104 F. Supp. 283 (N.D. Cal. 1952)	47
<i>United States v. Stevens</i> , 510 F.2d 1101 (5th Cir. 1975)	26
<i>United States v. Torres</i> , Dkt. No. 76-1226 (2d Cir. June 10, 1976), aff'g opinion below, 76 Cr. Misc. M. 11-188	2, 28
<i>United States v. Toscanino</i> , 500 F.2d 267 (2d Cir. 1974)	26
<i>United States v. Tucker</i> , 526 F.2d 279 (5th Cir.), cert. denied, 425 U.S. 958 (1976)	25

	PAGE
<i>United States v. Van Orsdell</i> , 521 F.2d 1323 (2d Cir. 1975)	26
<i>United States v. Vielguth</i> , 502 F.2d 1257 (9th Cir. 1974)	30
<i>United States v. Yanagita</i> , 552 F.2d 940 (2d Cir. 1977)	20, 25, 26, 27, 28

OTHER AUTHORITIES

F.R. Crim. P. Rule 6(d)	15
F.R. Crim. P. Rule 42	37
F.R. Crim. P. Rule 6(e)	9
Title 28, C.F.R., Section 50.2	9
Title 18, United States Code, Section 371	5
Title 18, United States Code, Section 841	5
Title 18, United States Code, Section 921	5
Title 18, United States Code, Section 3322	40
Title 18, United States Code, Section 3504 ..	10, 25, 30
Title 18, United States Code, Section 6002	3
Title 18, United States Code, Section 6003	3
Title 28, United States Code, Section 1826(a) ...	1, 4, 18, 36
Title 28, United States Code, Section 1861	33
Title 28, United States Code, Section 1863(b) (2) ..	39
Title 28, United States Code, Section 1867 ..	32, 33, 37, 38
United States Marshal's Manual, Section 613	48

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1286

In the Matter of
the Grand Jury Subpoena Served upon
PEDRO ARCHULETA

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Pedro Archuleta appeals from an order entered on June 30, 1977, in the United States District Court for the Southern District of New York, by the Honorable Richard Owen, finding him in civil contempt of court as a recalcitrant grand jury witness pursuant to Title 28, United States Code, Section 1826(a).

A motion by Archuleta for a stay of Judge Owen's order pending this appeal was denied by the Honorable William H. Mulligan, United States Circuit Judge, on June 7, 1977.

Statement of Facts

A. The Grand Jury Investigation

At about lunch hour on January 24, 1975, a bomb exploded in Fraunces Tavern in downtown New York City. The bombing killed four persons and injured 53 others. Responsibility for this bombing was later claimed in a communique by a group called the Fuerzas Armadas de Liberacion Nacional Puertorriquena and better known by its acronym FALN.

In April 1975, a grand jury was impaneled in the Southern District of New York to investigate, among other things, the Fraunces Tavern bombing and several other terrorist bombings for which the FALN had also claimed responsibility. During the term of that grand jury, numerous other terrorist bombings occurred in New York, as well as in Chicago and Washington, D.C. The April 1975 grand jury term expired on October 28, 1976,* and, just six days later, police officers and agents of the Federal Bureau of Investigation discovered a "bomb factory" in a Chicago apartment that also contained documents and papers linking the bombing paraphernalia—including dynamite, various explosive chemicals, blasting caps, detonator cord, propane tanks, timing devices, batteries—to the FALN and, more particularly, to one Carlos Alberto Torres, the owner of the apartment.

Among the other items found in the apartment was a letter dated February 3, 1975, to Maria Cueto, Executive

* The expiration of the grand jury resulted in the release of Lureida Torres, a witness before the grand jury who on May 13, 1976, was found in civil contempt as a recalcitrant witness by the Honorable Charles L. Brieant, Jr., United States District Judge. That order was affirmed by this Court on the opinion below. *United States v. Torres*, Dkt. No. 76-1226 (2d Cir. June 10, 1976), *aff'g opinion below*, (76 Cr. Misc. M. 11-188).

Director of the National Commission on Hispanic Affairs of the Protestant Episcopal Church, from a church in San Antonio, Texas.

Law enforcement personnel immediately made efforts to locate Torres after discovery of the "bomb factory," and arrest warrants were subsequently issued for Torres charging him with unlawful possession of an explosive device and unlawful flight to avoid prosecution. As part of their search for Torres, agents of the New York Office of the FBI sought on November 8, 1976, to interview Maria Cueto and her secretary, Raisa Nemikin, with respect to their knowledge of Torres. Both Cueto and Nemikin stated that both Carlos Alberto Torres and a close associate, Oscar Lopez, who was also being sought by the FBI, were members of the Commission, and Miss Cueto identified a photograph of Torres and reported that she had last been in New York on October 26, 1976, just one week before the discovery of the "bomb factory" in Chicago.

Meanwhile, a second grand jury was impaneled on November 9, 1976, to continue the investigation commenced by the grand jury that had expired October 28, 1976. From this new grand jury, subpoenas issued to Miss Cueto and Miss Nemikin, both of whom moved to quash, and upon the denial of their motions by Judge Pierce, *In the Matter of Wood*, 430 F. Supp. 41 (S.D.N.Y. 1977), both women were ordered to testify.

Cueto and Nemikin were granted immunity pursuant to 18 U.S.C. §§ 6002 and 6003 upon their respective invocations of their Fifth Amendment privilege against self-incrimination. Before the grand jury on February 18, 1977, Miss Nemikin refused to answer the three following questions:

- (1) "Miss Nemikin, when did you last speak or otherwise communicate with Carlos Torres?"

(2) "Miss Nemikin, I will ask you to please identify all funds, monies of the National Commission on Hispanic Affairs to the Protestant Episcopal Church of the United States, which were directed, openly or in secret, to the FALN, in whole or in part, indirectly or directly, and I include in that question all monies which were directed to any member of the FALN."

(3) "Miss Nemikin, I will ask you please to identify to the Grand Jury any person (*sic*) whom you know who are involved or have claimed responsibility for the dynamite bombing of Fraunces Tavern on January 24th, resulting in the death of four persons."

Miss Cueto, in her appearance two weeks later on March 4, 1977, refused to answer the three following questions:

(1) "Do you have any knowledge now about the whereabouts of Carlos Alberto Torres?"

(2) "Miss Cueto, did Carlos Alberto Torres play any part in the bombing of Fraunces Tavern here in New York on January 24, 1975?"

(3) "Miss Cueto, this Grand Jury is trying to find out, among other things, who is responsible for the bombing of Fraunces Tavern that killed four people. Can you tell us the names of any person who participated in the bombing or do you have any information at all with respect to it?"

On February 26, 1977, and on March 5, 1977, Nemikin and Cueto, respectively, were held in contempt of court and ordered incarcerated by the Honorable Marvin E. Frankel, United States District Judge, pursuant to Title 28, United States Code, Section 1826(a). These orders were affirmed by this Court. *In re Maria T. Cueto and Raisa Nemikin, Grand Jury Witnesses*, 554 F.2d 14 (2d Cir. 1977).

B. The Archuleta Subpoena

A day after this Court affirmed the contempt orders of Cueto and Nemikin, a grand jury subpoena was served on the contemnor herein, Pedro Archuleta. (J. App., Exhibit B).^{*} The grand jury subpoena commanded Archuleta's appearance to testify on April 4, 1977, relative to violations of Title 18, Sections 371, 841 *et seq.*, and 921 *et seq.*, which concern conspiracy; the importation, manufacture, distribution, and storage of explosive materials; and the importation, manufacture, and transportation of firearms, explosives and incendiary devices, respectively.

1. The Motion to Quash

Archuleta, by notice of motion dated April 4, 1977, moved to quash his subpoena on the grounds, *inter alia*, that (1) the Government was harassing him by haling him before successive grand juries in the Northern District of Illinois (the "Chicago grand jury") and then in the Southern District of New York (the "New York grand jury"); (2) the Government was seeking, in essence, to execute an end-run around Archuleta's claims of inadequate representation of Hispanic-Americans on the array of the Chicago grand jury before which Archuleta had already refused to testify ^{**}; (3) the New York

^{*} References to the Joint Appendix filed herein are designated by the prefix "J. App.". References to hearings had herein are designated to the transcript of the hearing by the prefix "Tr." followed by the date of the hearing. References to the appellant's Brief on Appeal are designated by the prefix "Br."

^{**} By subpoena dated November 17, 1976, Archuleta was called to testify before the Chicago grand jury. By subpoena dated December 15, 1976, Archuleta was summoned to provide fingerprints and palmprints and to submit to photographs of himself. On December 15, 1976, Archuleta refused to be sworn or answer questions in his appearance before the Chicago grand jury. At

[Footnote continued on following page]

grand jury was underrepresentative of Hispanic-Americans and thus he would somehow be deprived of due process in appearing as a witness; and (4) the subpoena represented an attempt to restrain the free exercise of Archuleta's First Amendment rights of association and expression and to chill those same rights belonging to unspecified other persons.

In response, the Government submitted the affidavit of Thomas E. Engel, the Assistant United States Attorney in charge of the grand jury investigation, setting forth the nature and scope of the investigation and describing in the barest terms the reasons for summoning Archuleta to testify. Among other things, the affidavit set forth that Archuleta was a member of the

that time, he was informed he was a "possible subject" of the grand jury inquiry and was given what amounted to *Miranda* warnings as to rights he was said to possess. (Judge Lasker apparently misread the Government's submission on this point (Exhibit "A" to Engel Aff. of May 13, 1977 at 1) by referring at least twice in his opinion to Archuleta's having been told in Chicago that he was a "suspect". (J. App., Exhibit C at 36, and 36, n. 12). Judge Brieant was willing, however, to treat "subject" and "target" as being interchangeable. (Tr. of Proceedings June 17, 1977 at 80)). On December 16, 1976 Archuleta was ordered to provide fingerprints and palmprints and to submit to being photographed by the Honorable James B. Parsons, Chief Judge of the Northern District of Illinois. A motion to quash the subpoena to testify was denied on December 22, 1976, by Judge Parsons. Upon his refusal to supply fingerprints and palmprints and to submit to photographs, the Government moved to hold him in contempt in response to which the witness claimed inadequate Hispanic-American representation on the grand jury array and illegal electronic surveillance on himself, his attorneys and associates. The latter challenge was denied by Judge Parsons on February 23, 1977. The question of the grand jury array, in the apparent absence of a Government challenge to Archuleta's standing to raise the claim, was only decided June 30, 1977 by Judge Parsons, who held that the representation of Hispanic-Americans on the array was not so meager as to offend either the Constitution or the Jury Selection and Service Act of 1968. *In re Pedro Archuleta et al.*, 76 G.J. 1128 Memorandum Opinion at 25-26 (N.D. Ill. June 30, 1977).

National Commission on Hispanic Affairs during the years 1972 and 1973. Further the Affidavit recited:

"Archuleta is uniquely capable of providing information to the grand jury as Torres and Lopez are not within the command of a warrant or subpoena, respectively. Cueto and Nemikin have refused to testify about the startling coincidence of persons who, on the one hand, have been associated with the Commission and, who, on the other hand, have been closely linked to terrorist bombings for the FALN."* Engel Aff. Apr. 14, 1977 ¶11.

On Sunday, April 17, 1977, the *New York Times* published an article entitled "3-Year Inquiry Threads Together Evidence on F.A.L.N. Terrorism" by Mary Breated. (J. App., Exhibit I.) The article set forth in some detail the history of terrorism carried out by the F.A.L.N. and recorded as well the subpoena and contempt proceedings of Maria Cueto and Raisa Nemikin. In addition, the newspaper article recounted "various police and Federal sources" as having supplied confidential information about the progress of the investigation. Part of this information, from what was described as a "confidential law enforcement document," was that

* The Government also submitted an *ex parte, in camera* affidavit setting forth the more intimate connection between the concerns of the grand jury and the activities of Archuleta. Judge Lasker found it unnecessary to consider the *ex parte* affidavit, however. (J. App., Exhibit C at 2, 23). There is, in any event, no reason why this Court should not inspect this affidavit, should the need suggest itself, to satisfy itself of the importance of Archuleta's potential testimony. Even ignoring the matters set forth in the *ex parte* affidavit, the fact that two members of the National Commission on Hispanic Affairs saw fit to go to jail rather than testify before the grand jury can only be said to quicken the interest as to what evidence other members, when under subpoena and under oath, might give.

Archuleta was a "suspect in the theft of the . . . dynamite" that failed to explode in two bombs set by the FALN—one in Chicago and one in New York. The story reports that Archuleta said the subpoenas to the grand juries in Chicago and New York were issued as a result of his support for leftist political activities in northern New Mexico.* Nowhere in the newspaper article is there a reference to grand jury testimony or exhibits.**

The motion to quash was heard by Judge Lasker on April 22, 1977, by which time Archuleta had claimed that the newspaper article provided an additional ground to quash the subpoena. At oral argument the Government represented to the Court "that no matter before the [New York] grand jury was leaked by anybody who is supervising the grand jury proceedings or who last [*sic*: should be "has"] testified before the grand jury proceedings here in New York, that is the United States Attorney's Office and the Federal Bureau of Investigation in New York." (Tr. of Proceedings, April 22, 1977 at 26). The Government stated in a supplemental affidavit filed in response to the charges of improper breach of grand jury matters that it was "not in a position . . . to deny (or to confirm) the truth of [the] assertion" that some of the information in the *Times* article came

* The article states that Archuleta was requested to give "handprints, fingerprints, handwriting samples and voice exemplars". Archuleta was subpoenaed for finger and palmprints, and for photographs of himself but not to give handwriting and voice exemplars.

** Archuleta refers (Br. at 11) to attributions in the article to "grand jury investigators", a concoction disingenuously dredged from the following sentence: "Since then [the discovery of the Chicago "bomb factory"] the grand juries have been empanelled and investigators say they are encountering various degrees of cooperation" (J. App., Exhibit I at 2).

from "federal sources somewhere in the United States."* (J. App., Exhibit U.)

On May 27, 1977 Judge Lasker handed down his opinion denying Archuleta's motion to quash on the grounds argued on April 22, 1977, leaving open only the question whether the allegations of electronic surveillance made pursuant to the Government's challenge on April 22, 1977 (*Id.* at 24) were prematurely raised by contemnor or inadequately denied by the Government. Specifically, Judge Lasker held that (1) Archuleta had no standing to challenge the array of the grand jury under the Jury Selection and Service Act of 1968 (28 U.S.C. § 1861 *et seq.*) as he was not a person specified under 28 U.S.C. § 1867 as being entitled to the benefits of its provision (J. App., Exhibit C at 11-12); (2) Archuleta had no standing under the Constitution to challenge the array of the grand jury (*Id.* at 19); (3) the "grand jury was conducting a careful, proper and limited in-

* Archuleta's quotes the prosecutor's remarks before Judge Lasker ("There is (*sic*) just too many people who have worked in this investigation for it to be controlled within one grand jury room") (Br. at 12) out of context to suggest that the prosecutor was seeking to justify leaks from the grand jury by referring to the breadth and scope of the investigation. This distortion ignores that the prosecutor was merely reporting that many law enforcement agencies and myriads of their personnel had worked on various aspects of this case. A certain quantum of that information procured in the course of the investigation may, in turn, be put before the grand jury without the knowledge on the part of law enforcement officials that the matter has been presented or even in the absence of knowledge of its relevance to the concerns of the grand jury. In that case, which at most was what was concerned here, the investigator's disclosure of information, while arguably improper as violative of Justice Department guidelines, 28 C.F.R. § 50.2, does not approach being a violation of grand jury secrecy. (J. App., Exhibit C at 36.) Judge Lasker's characterization of the newspaper's disclosures as "shameful" refers *only* to the assumed violation of the guidelines and not at all to violations of Rule 6(e) regarding grand jury secrecy.

quiry into the [FALN] bombings" and demonstrated no intent to harass Archuleta or any other member of the Hispanic Commission by virtue of the issuance of subpoenas, even if the subpoenas were issued to locate other prospective witnesses (*Id.* at 25-28); (4) the fact that the witness was required to appear before two grand juries conducting similar inquiries of different crimes occurring in both districts warranted no relief (*Id.* at 30); (5) the publication of the *New York Times* article relying in part on federal law enforcement sources * did not justify the quashing of Archuleta's subpoena (*Id.* at 37); and (6) neither Archuleta's proclaimed intention to refuse to testify, nor the proclaimed inadequacy of the foreseen use immunity order justified a refusal to disobey the command of the subpoena. (*Id.* at 33, 40).

2. The Electronic Surveillance Contentions

After Judge Lasker denied his motion to quash, Archuleta refused to appear before the grand jury alleging that he, his attorneys, and his associates had been the subjects of illegal electronic surveillance and that under 18 U.S.C. § 3504, he was entitled to litigate that issue prior to appearing. Judge Lasker rejected this position by opinion dated June 14, 1977, holding that Archuleta had "no present right to litigate whether he was the victim of illegal electronic eavesdropping and whether that eavesdropping tainted these grand jury pro-

* Judge Lasker ordered the United States Attorney for this District to investigate within this District to determine whether there were any federal sources of improper disclosure and to report to him the results of his investigation and requested the Attorney General to conduct the inquiry within the Justice Department outside the Southern District of New York. (*Id.* at 39). Robert B. Fiske, Jr., the United States Attorney for the Southern District of New York, has reported the results of his investigation to Judge Lasker. The Attorney General has requested the FBI to conduct the investigation nationally, and that has now been undertaken.

ceedings." (J. App., Exhibit F at 10). In dictum, Judge Lasker said that the affidavits submitted by Archuleta in support of his claim (J. App., Exhibit E) were sufficient to trigger a response by the Government affirming or denying such surveillance, and in *obiter dictum* Judge Lasker observed that "an appropriate government response" should seek to garner affidavits from New Mexican state and local officials affirming or denying surveillance. Judge Lasker denied a stay of the execution of the subpoena until the Government submitted its report on the leaks, if any, to the *New York Times*. Archuleta—after two and a half months of litigation—was finally ordered to appear.

C. The Proceedings Before Judge Brieant

1. The Court's Instructions to the Grand Jury

On June 17, 1977, Archuleta appeared before the Grand Jury, but at his counsel's request, the grand jury was first instructed by Judge Brieant in matters in which grand juries are commonly instructed by district judges at their impaneling. Judge Brieant thought it useful to re-instruct the grand jury only because the transcript of the instructions of the Honorable Irving Ben Cooper, United States District Judge, given November 9, 1976 upon the impaneling, could not be located and because whatever instructions were given might have become stale. (Tr. of Proceedings June 16, 1976 at 32-33).

The grand jury was instructed at length and with care by Judge Brieant, who allowed Archuleta and his counsel to be present throughout. Specifically, Judge Brieant admonished the grand jury as to the secrecy of its proceedings and the reasons for secrecy (*Id.* at 46, 48-49); the power of the grand jury to compel witnesses to answer questions reasonably necessary to the work of the grand jury (*Id.* at 49); the authority of the At-

torney General to request and the power of the court to grant use immunity to a witness (*Id.* at 49-50); the power of the grand jury, through its foreman to have the court direct the witness to answer, if after being granted immunity, the witness persisted in his refusal to answer (*Id.* at 50); and also of the right of the grand jury, in the event the witness flouts the direction of the court, to refer the matter to the court for an order of contempt where the witness would have the right to a hearing.

On the subject of contempt, Judge Brieant amplified his instructions by charging the grand jury as follows:

"I caution you each that a decision to seek to hold a witness in contempt is a step which is not to be taken lightly, since it may result in that witness going to jail for a period of time because of a refusal to give testimony. Thus, I urge you, before you request that any witness be cited for contempt or compelled to answer, that you carefully consider the consequences of your action and exercise that independent judgment which is the responsibility of each and every one of you as grand jurors under your oath in connection with your duties regarding the administration of justice.

"Specifically, no witness should be directed to answer a question which is unnecessary to your work, or the answer to which would be merely cumulative and useless, and no witness should be interrogated solely for purposes of harassment or coercion, or for any other improper purposes.

"The purpose of taking testimony is solely to assist you in the functions which are entrusted to you under the law. The sole purpose of all your proceedings is to ascertain whether federal crimes have been committed and whether there is reasonable cause to believe that any person or persons

have committed such crimes, and your vast powers as members of the grand jury are to be exercised forthrightly and fully solely with this end in mind, not for any improper purpose or any coercion or harassment.

"I, or the Judge assigned to this part of the court, will be available to you at all times during the term of court, and if you have any doubts or any questions with respect to your functions, powers or duties, please don't hesitate to call upon the Part I Judge to ask for further instructions.

"To recapitulate briefly, I want to make clear to you that you as an inquisitorial body are not subservient to the United States Attorney or any of his Assistants, and indeed you are not subservient to the Court, although it is your duty to follow the explanations of law given to you by the Court."

"You have an independent responsibility in connection with the taking of testimony and the determination as to whether or not individuals are to be indicted for federal crimes, and if so, what crimes they are to be indicted for." (*Id.* at 51-52)

"As I said earlier, the power of coercive civil contempt is not imposed on a witness either by the Court or requested by the grand jury or the Court unless it is necessary in your view for the administration of justice, and specifically nothing like that should be done merely to harass or oppress anybody or for any other improper purpose." (*Id.* at 55.)*

* In light of these instructions, Archuleta's claim (Br. at 22) that the grand jurors were not instructed on some standard for calling witnesses and subjecting them to the coercive power of subpoena and contempt is ludicrous on its face. The instructions are a sober recounting of the solemn duties that grand jurors perform.

2. The Invocation of the Privilege and the Grant of Use Immunity

Following these instructions Archuleta finally appeared to answer questions before the grand jury. He was asked the following four questions:

(1) "Did you provide dynamite to anyone you knew to be in a group called the FALN at any time prior to January 24, 1975?" (J. App., Exhibit H at ML-3(2)).

(2) "Do you know the source of dynamite explosives used at the bombing of Fraunces Tavern?" (*Id.* at EJC-2(2)).

(3) "Do you know anyone who is responsible for the bombing at Fraunces Tavern?" (*Id.* at EJC-3(2)).

(4) "In early 1968 did you yourself steal any dynamite from the Heron Dam Project site near Parkview, New Mexico?" * (*Id.* at EJC-4(2)-(5)(2)).

Archuleta invoked, *inter alia*, his Fifth Amendment privilege in response to these questions.

The Government thereafter applied to Judge Brieant for an order of immunity upon a written application from Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, with the authorization of Benjamin R. Civiletti, Assistant Attorney General, and supported by the affidavit of Thomas E. Engel, Assistant United States Attorney, who was in charge of the grand jury investigation. (J. App., Exhibit G). After

* When these questions were read to the District Court, the courtroom was cleared and thereafter the questions were referred to by number. (*Id.* at 65-67). On the order to show cause, the papers were sealed and the same procedure was followed at the hearing. The questions were included by counsel for Archuleta in the Appendix, however, and are, therefore, now a matter of public record. (J. App., Exhibit H).

permitting counsel for Archuleta the extraordinary opportunity to be heard in opposition to the application, Judge Brieant granted the application and signed the order. In response to Archuleta's argument that his claimed future testimony would be insufficiently protected from the Chicago grand jury, where he was a target, and insufficiently protected from wholesale disclosure because of asserted leaks to the *New York Times*, Judge Brieant observed:

" I believe this Court can protect the integrity of grand jury proceedings—but even if we cannot, the public interest in prosecuting bombers is greater than the problems created by breaches of their oath on the part of grand jurors as to the secrecy of their proceedings. And based on that conclusion, it is how I intend to deal with this matter.

* * * * *

If you want to take that issue up on appeal, that is a very good appellate issue, but I am really certain that the Court of Appeals and the Supreme Court, if they have to balance the inconvenience to a person caused by an unfaithful grand juror who talks, with the need of the public to stamp out crime, are going to protect the public at the expense of the grand jury witnesses." (Tr. of Proceedings, June 17, 1977 at 97).

3. The Protective Order

Thereafter, Judge Brieant entered a protective order at the request of Archuleta. The order restricted Archuleta's testimony from being disseminated outside the United States Attorney's Office for the Southern District of New York, in addition to those authorized by Rule 6(d), F.R.Crim.P., and seven named agents of the FBI assisting the United States Attorney in the investigation.

Moreover, the Judge ordered, again at the defendant's request, that the testimony he gave before the Chicago grand jury on December 15, 1976, not be disclosed to the New York grand jury.*

Judge Brieant declined to order a "certification" of the evidence in the Government's possession dealing with Archuleta prior to his appearance recognizing the obvious: that should the Government not choose to seal and file its proof prior to his appearance, "it would be almost impossible to attempt to prove freedom from taint" of the prosecution. (*Id.* at 119). Finally, the Court ordered the Government to supply Archuleta and his counsel a copy of the transcript of his testimony within a reasonably short time following his appearance and to effect personal service of the Court's order upon the persons subject to the protective order. (*Id.*)

4. The Refusal to Answer

Having received virtually all the protections he demanded by a patient and persevering District Judge, Archuleta commenced his contumacious, as distinguished from his theretofore merely obstructive, behavior before the grand jury. Notwithstanding the immunity order, Archuleta refused to answer the same four questions put to him prior to his invocation of his Fifth Amendment privilege. He repeated his refusal to answer at the express direction of the Foreman. His basis for refusing to answer was his continuing objection that the grand jury was being used to combat his political beliefs and those of his persuasion. The witness was directed to appear again before Judge Brieant, who, upon the Government's motion that Archuleta be held in contempt, had

* This order may be deemed superfluous in light of Archuleta's refusals to be sworn and to answer questions before the Chicago grand jury.

the transcript of the testimony read back by the grand jury reporter. (*Id.* at 125-35; J. App., Exhibit H).

Judge Briant then addressed the grand jurors as follows:

"THE COURT: At this time, Mr. Foreman, is it the consensus of the grand jurors that the answers to these questions obtained from this witness are reasonably necessary and proper for the purposes of the grand jury's work?

THE FOREMAN: Yes, sir.

THE COURT: Is there any grand juror here present who disagrees with the statement just made by the foreman? If so, raise your hand and speak. Hearing none, I accordingly direct the witness to return to the grand jury room and answer the questions pertaining to the alleged bombing and alleged dynamite." (Tr. 135-36)

Archuleta renewed his claim that illegal electronic surveillance upon him, his attorneys and his associates justified his refusal to answer. The Assistant United States Attorney renewed his denial of knowledge of any such surveillance made previously by affidavit before Judge Lasker. Judge Briant thoroughly rejected Archuleta's contention that Judge Lasker's view of an "appropriate" Government response as including denials by local New Mexican authorities excused Archuleta from answering.* Archuleta was warned that his continued

* Archuleta's quibbles with the Government's characterization of Judge Briant's attitude as a rejection of Judge Lasker's suggestions (Br. at 17) are contradicted by the record:

"The Court: I don't agree with that at all.

* * * * *

The Court: No, I reject that." (Tr. of Proceedings, June 17, 1977 at 141).

refusal to answer questions would subject him to contempt and confinement and was then directed to return to the grand jury room. In the event of Archuleta's continued refusal to answer questions, Judge Briant directed the Government to "present an order to show cause why . . . [Archuleta] should not be confined pursuant to an order of coercive civil contempt." (*Id.* at 143).*

Archuleta returned to the grand jury and reasserted his refusal to testify.

5. The Contempt Proceedings

By order to show cause signed by The Honorable Dudley B. Bonsal, United States District Judge, dated June 24, 1977, the Government moved to have Archuleta held in civil contempt pursuant to Title 28, United States Code, Section 1826(a). A hearing on the motion was held on June 30, 1977, before The Honorable Richard Owen, United States District Judge.

In defending the motion, Archuleta first took the position that, without disputing the accuracy of the minutes, the grand jury reporter who took the minutes would have to authenticate them and submit to cross-examination. Emily Cordes, the grand jury reporter who took Archuleta's testimony (if such it may be called) testified as to the accuracy of her notes and the transposition of her notes into transcript. (Tr. of Proceedings,

* Archuleta's suggestion (Br. at 25) that Judge Briant viewed his behavior differently from Judge Owen, before whom the hearing on the order to show cause was held, is belied by Judge Briant's explicit direction to the Government. Judge Briant's more charitable view of contemnor's motives does not obscure the fact that Archuleta's attempts to avoid testifying had run their course.

June 30, 1977 at 43). The notes and transcript were then compared for accuracy, two typographical errors were noted and changed, and the transcript was received in evidence. (*Id.* at 51; GX 1).

Archuleta renewed his claim that the Government had inadequately denied his claims of illegal electronic surveillance. The Government relied on the affidavits previously submitted, pointing out that the electronic surveillance indices of both the New York field office and the Washington headquarters of the FBI were checked, according to the affidavit of Martin A. Crowe, and that neither index revealed any surveillance on Archuleta, his attorneys, or his associates. (*Id.* at 39).^{*} In response, Archuleta sought to analogize his situation to that of political activists in New Haven, Connecticut whose telephones were apparently the subjects of eavesdropping by federal and state authorities, but Judge Owen refused to consider newspaper clippings of these events as relevant to the question of Archuleta's contempt. (*Id.* at 54).

The final argument made to Judge Owen was a renewal of Archuleta's claim regarding the asserted inadequate representation of Hispanic-Americans on the grand jury array. No evidence of such discrimination was presented to Judge Owen (who declined to treat

^{*} The Government also elucidated the means by which the national indices of the FBI were checked by informing the Court that the FBI field offices in Albuquerque, New Mexico and Chicago were checked for their local indices on persons who resided in the respective areas. The New York and Washington indices were checked for all persons listed by Archuleta. (*Id.* at 51-52). Archuleta, while disputing the reliability and evidentiary value of these representations by the prosecutor (Br. at 20, n.), does concede the fact that the FBI conducts its electronic surveillance checks in the manner the prosecutor described. (Br. at 18-19).

the entire proceedings before Judge Lasker as being before him.)* (*Id.* at 600).

Judge Owen then found Archuleta to be in contempt, to which the audience in the courtroom responded by hissing. Judge Owen, after emphatically warning the audience that another such outbreak would require clearing the courtroom, found that (1) the denials by the prosecutor and FBI agents met the standards most recently set forth in *United States v. Yanagita*, 552 F.2d 940 (2d Cir. 1977); (2) the Government was acting properly in seeking evidence from Archuleta as a member of the National Commission on Hispanic Affairs; ** (3) Archuleta had no standing to challenge the array of the grand jury; and (4) the fact that there might have been leaks from a grand jury does not excuse a witness from testifying. The Court's rulings of law were buttressed by this emphatic conclusion:

"Now I see here a pattern of continuing obstruction by every conceivable device available to skillful and resourceful counsel.

* The evidence of underrepresentation before Judge Lasker consisted of two affidavits of Dennis Cunningham, Esq., one of a minimum of six lawyers who represented Archuleta before the District Court, which set forth matters occurring before the district court in Illinois and made brief reference to 1970 census figures and to figures from an unidentified source showing that so-called "Latinos" served as jurors (an irrelevant classification in any event) in a percentage less than their percentage of the population would seem to require. The only other submission was that of Sara Chrisman who swore that "students of the problem have concluded" that the percentage of Spanish speakers in the population of New York (she does not state New York City or New York State) might be higher than reported in the 1970 Census.

** Archuleta had briefly contended that by calling three members of the National Commission on Hispanic Affairs of the Episcopal Church, the grand jury, was conducting an inquisition. Judge Owens rejected this argument as "incredible." (*Id.* at 33).

For three months the government has been denied the right to the legitimate testimony of one of its citizens." (*Id.* at 67).*

Archuleta was then permitted to address the Court in his own behalf. After he was heard, the Court addressed him in the following terms:

"THE COURT: Mr. Archuleta, let me focus on what we are here about.

"There was something that occurred in this city where a number of innocent people got killed in an act of violence not too far back.

"The authorities are investigating the cause of that killing of citizens. They have offered you immunity if you will tell them what you know, if anything. You may know nothing. They have offered you immunity if you tell them what you know having to do with that incident in which people that were complete strangers to the whole thing got killed. That is all we are talking about.

"The question is, why don't you tell them? That's the whole thing we have been here on. Why don't you tell them?" (*Id.* at 75-76).

Archuleta then continued to address the Court at some length declaring in part he would not be a "stoolie" or labeled as a "stoolie". (*Id.* at 79). At the conclusion

* Judge Owen then heard Archuleta personally and his counsel on the question of the contemnor's incarceration. Counsel urged the Government's "unclean hands" as justifying the refusal to testify. Judge Owen ruled, however, as follows:

"The Court: You have not shown any unclean hands. They have asked very material questions. There have been no answers. The Judge has directed the answers. There still have been no answers.

"The questions bear upon an incident of substantial importance in this country." (*Id.* at 72-73).

of the speech, his supporters carried on sustained applause for a period of 15-20 seconds. The judge ordered the courtroom cleared and declared a recess until sufficient marshals could be summoned to remove the demonstrators physically from the courtroom. (*Id.* at 80-81). After marshals appeared and dragged the protestors from the courtroom, Judge Owen ordered Archuleta confined forthwith and denied a stay of his order. (*Id.* at 83, 85).

Judge Owen ordered the marshals to proceed as customary in civil proceedings and to treat the prisoner as a civil contemnor. (*Id.* at 85-86).

ARGUMENT

POINT I

The Government Adequately Denied that the Questioning of Archuleta Before the Grand Jury was the Product of Electronic Surveillance.

Archuleta contends that he had just cause to refuse to answer the questions propounded to him before the grand jury because the Government inadequately denied that the questions derived from illegal electronic surveillance. On the contrary, the Government's denials of any electronic surveillance, especially in view of the flimsy allegations of any wiretapping or eavesdropping of the witness, his counsel, or his associates were not only adequate, but supererogatory.

Having been challenged to produce the inevitable allegations of electronic surveillance before the motion to quash his subpoena was inevitably denied, Archuleta produced an inevitably lengthy list of persons and organizations allegedly overheard on electronic surveillance by the Government:

1. Pedro Archuleta, III
2. Pedro Archuleta, Sr.
3. Nick Lopez
4. La Clinica Del Pueblo
5. La Cooperacion
6. Derechos de Familia
7. Richard Rosenstock
8. Charlie Driscoll
9. Joan Friedland
10. Morton Simon
11. Craig Vincent
12. Robert Rothstein
13. Moises Morales
14. Valentina Tijerina
15. Michael Deutsch
16. Mara Segal
17. Kingsley Clarke
18. Dennis Cunningham
19. Susan Jordan
20. Mary Josephine Lujan
21. Doris Peterson
22. Tony Lopez
23. Maria Varela
24. Lawrence Stein
25. Holly Maguigan
26. Center for Constitutional Rights
27. Linda Backiel
28. Margaret Ratner
29. Elizabeth Fink

In support of his motion that the Government deny surveillance on these persons, most of whom were alleged to have only the most ephemeral relationship to Archuleta or one or another of his lawyers, Archuleta trotted out the same tired factual allegations that have been made before this Court time and time again when witnesses have been summoned before grand juries, and in particular before this grand jury. See *infra* at 27-28. That is, a series of difficulties and oddities about various telephonic communications is recited in the apparent belief that these clicks, echoes, high-pitched sounds and background voices irresistibly point to the existence of electronic surveillance. Over the Government's strenuous objection, Judge Lasker found that they were sufficient to require that the Government affirm or deny the existence of the surveillance. (J. App., Exhibit F at 6).*

The affidavits of Archuleta and Mary Josephine Lujan, relied upon so heavily by Archuleta (Br. at 21) and in part by Judge Lasker (J. App., Exhibit F at 3), establish that the FBI asked Ms. Lujan if Pedro Archuleta had called her by telephone at her home phone in Del Norte, Colorado. Archuleta concludes from this that he has been the subject of electronic surveillance. Yet it is clear that the FBI could have found out about the phone call or calls, which were from New Mexico to Colorado, as a result of viewing long-distance telephone

* Judge Lasker apparently did not consider that there had been absolutely no showing whatsoever that there exists any logical nexus between the clicks, etc., complained of, on the one hand, and the aura, effects of wiretap surveillance, on the other hand. Indeed, taken as a whole on their face, these allegations were so flimsy and insubstantial that they require neither that a hearing be held nor even that the Government respond to the allegations since they describe in large part nothing more than the ordinary experiences encountered by any telephone user. *In re Vigil*, 524 F.2d 209, 214 (10th Cir. 1975).

toll records maintained by the telephone company.* The Government was prepared below to make an *ex parte* and *in camera* submission on the subject.**

Seen in this light, there can be little doubt that there is no sufficiently "colorable" basis even to trigger the Government's obligation to affirm or deny the existence of illegal electronic surveillance under 18 U.S.C. § 3504. *United States v. Yanagita*, 552 F.2d 940, 945 (2d Cir. 1977), *In re Millow*, 529 F.2d 770, 774, (2d Cir. 1976) ("The statute was not intended, however, to transform an investigation by the Government into an investigation of the government where claims of illegality lack substantial support"), *United States v. Tucker*, 526 F.2d 279, 289 (5th Cir.), *cert. denied*, 425 U.S. 958 (1976) ("A generalized motion based on the possibility of such surveillance, which is all that is present here, is not a claim within the meaning of 18 U.S.C. § 3504(a) (1)"). See *United States v. See*, 505 F.2d 845, 856 (9th Cir.), *cert. denied*, 420 U.S. 992 (1974).

Assuming, in any event, that the witness has made a sufficient showing to require a Government response, it is clear that the Government's response has been more than adequate. First, the test under Judge Lumbard's concurrence in *United States v. Grusse*, 515 F.2d 157, 159 (2d Cir. 1975), an even less stringent version of

* Indeed, it appears from the Lujan affidavit (¶ 6) that she was shown a "card with many telephone numbers on it including mine". This description is wholly consonant with the probability that the FBI found out about the phone call from telephone toll records, which she in fact was shown.

** Judge Lasker never accepted this invitation from the Government, a fact that made him lean heavily on these assertions in finding that the allegations were sufficient to require a response. We urge this Court to request our submission.

Before Judge Owen, the Government specifically denied that the means by which the Government knew of the Archuleta phone call to the Lujan phone was electronic surveillance. (Tr. of Proceedings June 30, 1977, at 9).

which was adopted by the Court in Judge Mansfield's opinion in *United States v. Yanagita*, *supra*, has been met, since the supervisors in charge of the FBI investigation and the Assistant United States Attorney handling the case, being the persons most likely to know of the fruits of electronic surveillance, have denied under oath any knowledge of its existence. Affidavits were also submitted by the prosecutors and the FBI agent in charge of the investigation in Chicago denying the existence of surveillance.* (J. App., Exhibit E.) Especially in view of the witnesses' inadequate assertions in this case, these denials are sufficient, and would have been even had they been unsworn. *See, e.g., In Re Mintzer*, 511 F.2d 471, 472 n.2 (1st Cir. 1974) ("all that can be required is that those conducting the grand jury proceeding affirm that they have no knowledge of and have not in any way employed other taps in formulating lines of inquiry or questions to be posed to the witness"); *United States v. Stevens*, 510 F.2d 1101, 1104-05 (5th Cir. 1975) (unsworn denial by government counsel sufficient); *United States v. See*, 505 F.2d 845 (9th Cir.), *cert. denied*, 420 U.S. 992 (1974) (duty of Government to respond depends upon specificity of claims raised by the witness); *United States v. D'Andrea*, 495 F.2d 1170, 1174 n. 12 (3d Cir. 1974) (unsworn denial); *United States v. Moeller*, 402 F. Supp. 49 (D. Conn. 1975) (case agents affidavits).

* Judge Lombard observed in *Grusse*, *supra*, in language specifically adopted by this Court in *United States v. Yanagita*, *supra*, 552 F.2d at 944,

"It must be remembered that any electronic surveillance by the government is only relevant if it is somehow used in formulating questions that the grand jury intends to ask. Thus, surveillance conducted by the government, the results of which were not known to the agents investigating the case, would not be relevant."

515 F.2d at 195. *See also In re Buscaglia*, 518 F.2d 77, 78-79 (2d Cir. 1975); *United States v. Van Orsdell*, 521 F.2d 1323, 1325 (2d Cir. 1975); *United States v. Toscanino*, 500 F.2d 267, 281 (2d Cir. 1974).

Under the circumstances, there was no foreseeable possibility that the questions that the prosecutor put to the witness could have been based on fruits of electronic surveillance or that the prosecutor would not have known that the questions were such fruits.*

In addition, the Government submitted a sworn affidavit from Special Agent John Smythe denying the existence of any electronic surveillance on any of the 29 persons listed in the Archuleta moving papers filed here and in Chicago. Although Judge Lasker indicated in rank dictum that further denials from the Government might be appropriate, both Judge Brieant and Judge Owen, in ruling that Archuleta answer the questions put to him, held the Government's responses sufficient.** (Tr. of Proceedings June 17, 1977 at 141 and Tr. of proceedings June 30, 1977 at 67). Similar denials were held sufficient by Judge Frankel when Maria Cueto and Raisa Nemikin and their myriad attorneys (who in part resurface in the electronic surveillance allegations of Archuleta) and associates claimed they had been the subjects of illegal electronic surveillance.*** *In the Mat-*

* *Yanagita* adds the gloss that the questions put to the witness should be "narrow in scope", *id.* It is quite obvious that the questions put to Archuleta were extremely confined in scope and could be answered easily by any witness who desired to testify. None of the questions here involved the "Did you ever in your life . . .?" type of question that might strain a witness' ability to answer the question truthfully or lure an unwary witness into an unintended misstatement.

** In this regard, it should be noted that the Government's affidavits filed in response to the same allegations in the Northern District of Illinois with respect to the first 20 of the 28 persons listed by Archuleta in Chicago were held sufficient by the Honorable James E. Parsons, Chief Judge, in an oral opinion rendered February 23, 1977. As the Court may observe, they more than show compliance with the *Yanagita* standard.

*** Judge Lasker's dicta to the effect "that an appropriate government response should include either denial or affirmation of electronic surveillance in New Mexico" suggests the necessity

[Footnote continued on following page]

ter of Maria Cueto. (Transcript of Proceedings March 5, 1977 at 41) "[T]he possibility of taint . . . was exceedingly remote."

There is, in short, no compelling reason why this Court should not follow the solid body of appellate case law in both this and other Circuits. The Government's denial has been sufficient against allegations insufficient to trigger the response itself. Judge Brieant did not even require an affidavit such as the one filed by Agent Smythe in holding the witness Lureida Torres in contempt before the predecessor grand jury to this one ("I think I should observe that further enquiry into possible electronic surveillance in the face of the denials under oath by persons intimately familiar with the investigation and by the person who was framing the questions would be both unnecessary and undesirable.") In *re Grand Jury Subpoena of Lureida Torres*, (Transcript of Proceedings May 13, 1977 at 35). Cueto's contempt was affirmed by a *per curiam* holding of the Second Circuit. In *re Maria T. Cueto and Raisa Nemikin, Grand Jury Witnesses*, 554 F.2d 14 (2d Cir. 1977). The *Torres* holding was affirmed on Judge Brieant's opinion below. In *the Matter of Lureida Torres*, Dkt. No. 76-1226 (2d Cir. June 10, 1976).

of checking local officials to see if electronic surveillance was undertaken. This view, it may be stated simply, is without support in the law. Moreover, Judge Lasker's observations were made in the absence of the questions that have now been put to Archuleta, questions which, under the circumstances, clearly show that they derive from sources other than illegal electronic surveillance. *United States v. Yanagita, supra*, 552 F.2d at 944.

Archuleta argues that in this case more is required of the Government than a denial by the FBI and the United States Attorney's office, because other law enforcement agencies, especially other federal agencies, as well as the New York City, Chicago, and New Mexico Police Departments, investigating FALN activities may have supplied information to the FBI in connection with its investigation. (Br. at 53-54). This information, contemptor speculates, may have been derived from electronic surveillance of them and presented to the FBI and United States Attorney's office in a form disguising its source (Br. at 55). Such surmises, clearly theoretical if not fanciful in the face of the Government's affidavits, do not provide just cause for Archuleta to refuse to testify. In light of "the strong public policy of this Circuit of not permitting disruption of grand jury proceedings absent compelling reasons," *United States v. Grusse*, *supra*, 515 F.2d at 158 (Timbers, J.), the Government "need not preclude every possibility of taint" before a witness may be compelled to give testimony, particularly in a case of such overriding public importance as this one.* In re *Grand Jury Investigation (Testa)* 486 F.2d 1013, 1017 (3d Cir. 1973), *cert. denied sub nom. Testa v. United* *tes*, 417 U.S. 919 (1974).

Absent at least some credible suggestion by counsel that the questioning before the Grand Jury appears to be a possible fruit of their conversations, which plainly is not the case here, a mere theoretical possibility that

*Archuleta's lame distinction of *Grusse* on the ground that in *Grusse* a hearing was held where the prosecutor was cross-examined ignores the fact that the Assistant United States Attorney there had submitted the only affidavit denying electronic surveillance, and the hearing established merely that the prosecutor's inquiry "had been directed solely to a Special Agent of the Federal Bureau of Investigation with supervisory responsibilities for this matter." In re *Grusse*, 402 F. Supp. 1232, 1235 (D. Conn. 1975). In the instant case, the FBI affidavits merely established what the hearing in *Grusse* established.

electronic surveillance of conversations involving the witness or his counsel was used to question is clearly an insufficient basis to vacate the contempt order. Here, the affidavits of counsel provide no factual basis for a suggestion that conversations over their telephones concerning Archuleta were intercepted. No allegation was made in any affidavit, or at any hearing below, that any questions asked of the witness appeared to be the result of conversations counsel might have had between themselves or with anyone else.* Thus, Archuleta failed even to meet the legal standard announced in *United States v. Alter*, 482 F.2d 1016, 1026 (9th Cir. 1973), which was relied on heavily by Judge Lasker in finding that Archuleta had met his burden under 18 U.S.C. § 3504 (J. App., Exhibit F at 5), because they have failed to "make a prima facie showing that good cause exists to believe that the witness' counsel was subjected by someone to illegal surveillance in connection with the Grand Jury proceeding in which the witness is involved." See *United States v. See*, 505 F.2d 845, 856 (9th Cir.), cert. denied, 420 U.S. 992 (1974); *United States v. Vielguth*, 502 F.2d 1257, 1260 (9th Cir. 1974).

Accordingly, Judge Briant's and Judge Owens' findings that the electronic surveillance checks adequately safeguarded contemnor from any genuine possibility that his questioning was based upon surveillance of him or his counsel was not erroneous.

It remains only to comment briefly on the nature of the claims of illegality raised in this case. We respectfully submit that too often a claim of illegal electronic

* The lack of such an allegation distinguishes the situation here from that in *In re Quinn*, 525 F.2d 222 (1st Cir. 1975), In *Quinn*, one of the questions propounded to the witness before the Grand Jury concerned a telephone conversation with his attorney which, the witness alleged, must have been overheard illegally on the witness' telephone.

surveillance made by a grand jury witness is merely a device to obstruct a grand jury investigation and to attempt to justify a refusal to testify, the true basis of which has no relationship whatsoever to electronic surveillance. The grand jury's investigation in this case concerns the most callous of criminal conduct—terrorist bombings of public places that have resulted in the loss of innocent lives. To avoid providing testimony that may lead to the apprehension of those who have engaged in this conduct in the past, continue to engage in it as this case has been heard, and threaten to engage in it again, Archuleta has raised claims of electronic surveillance that are without the slightest factual basis. These claims are made, moreover, not only as to one witness and one lawyer, but as to twenty-nine persons and organizations and seek not only federal, but state and local denials of surveillance, legal or illegal. The endorsement of such fishing expeditions, we submit which has the perhaps intended side effect of allowing any person to discover whether he or she has been wiretapped simply by alleging some insubstantial association with a recalcitrant or contumacious witness, is simply and utterly without any basis in law or experience.

POINT II

Archuleta has no Standing to Attack the Composition of the Grand Jury.

Encouraged by his challenge to the composition of the grand jury in Chicago, a challenge that has brought its work to a halt for almost seven months, Archuleta challenged the composition of the grand jury in New York on the ground that there was substantial failure to comply with the Jury Selection and Service Act of 1968, thereby seeking access to all relevant papers and evidence of the jury clerk in the Southern District of New York pursuant to 28 U.S.C. § 1867. When his standing to do so appeared dubious, Archuleta urged constitutional grounds

for his right to attack the composition of the grand jury. Judge Lasker's thorough and sound opinion sufficiently answers Archuleta's claims, which must be rejected by this Court as well.

A. The Contemnor has no Statutory Standing

Archuleta's challenge to the grand jury array was properly rejected by Judge Lasker in the first instance because Archuleta, appearing only as a witness before the grand jury and not as a defendant in a criminal case or a party in a civil case, was without the statutorily specified standing to challenge the selection of the grand jury pursuant to the exclusive provisions for doing so in the Jury Selection and Service Act of 1968 (the "Act"), 28 U.S.C. § 1867.

The provisions of Section 1867 are simple: Subsection (A) refers explicitly to a criminal *defendant*, who may move to dismiss his indictment or for a stay of the proceedings under the section if he can show substantial failure to comply with the provisions for selecting grand or petit jurors; subsection (b) extends the same rights as in subsection (a) to the Attorney General in criminal cases; subsection (c) refers to *parties* in civil actions and provides the same rights as in (a); subsection (d) prescribes that the moving party in (a), (b) and (c), having presented a sworn statement which, if true, would justify relief, may present testimony of the jury clerk or relevant documents and records in support of his motion; subsection (e) prescribes the procedures of § 1867 to be the exclusive means by which a criminal defendant, the Attorney General, and a civil party may challenge the selection of the grand or petit jury, saving that all remedies *otherwise available* (i.e. in the form of civil suit or criminal action) might still be employed for vindication of enforcement of laws prohibiting discrimination on the bases of race, color, religion, sex, national origin or economic status; subsection (f) prohibits dis-

closure of records concerning jury selection and provides for inspection and copying of such records by *parties to actions*.*

It is undisputed that Archuleta is not a criminal defendant, is not a party to a civil action, and is not the Attorney General. He is, therefore, entitled to no relief under the section or under Article X of the Jury Selection Plan submitted by the United States District Court for the Southern District of New York, M10-468, order of January 16, 1972, promulgated pursuant to the provisions of the Jury Selection and Service Act of 1968.

Archuleta's status as a contemnor (or contumacious witness) does not enlarge his rights under the Act. The statutory purpose of the act is to provide juries, grand and petit, selected at random from a fair cross section of the community in the District to "all litigants . . . entitled to trial by jury." 28 U.S.C. § 1861. Whatever the coercive, as opposed to penal, effect of civil contempt may be, it is clear that the subject of civil contempt proceedings has no right to a jury trial, *Shillitani v. United States*, 384 U.S. 364, 371 (1966), and is, therefore, not a litigant within the meaning of the act. Nor does Archuleta's status as a civil contemnor render him any more susceptible of protection under § 1867(c), which extends to civil "parties" the right to inspect jury lists, *cf. Test v. United States*, 420 U.S. 28, 30 (1975). The right to challenge under subsection (c) is limited by its terms to challenges to the selection of a "petit jury", something to which Archuleta is not entitled.**

* This section makes clear, as Judge Lasker, held, that Congress intended to permit no disclosure of grand jury selection records unless the applicant were entitled to move under § 1867 (a), (b), or (c) to challenge grand jury composition. (J. App., Exhibit C at 10).

** Moreover, as Judge Lasker found the failure of Congress to specify that a civil party might challenge a grand jury mandates the exclusion of a grand jury witness from those included as a "party" or "litigant" in a civil case.

B. The Contemnor may not Challenge the Composition of the Grand Jury on Constitutional Grounds

Archuleta claims that, even if he may not challenge the grand jury by statute, he may challenge the grand jury on constitutional grounds, citing as his sole support therefor a footnote in this Court's decision in *United States ex rel. Chestnut v. Criminal Court of the City of New York*, 442 F.2d 611 (2d Cir.), *cert. denied*, 404 U.S. 856 (1971). The same footnote constituted the linchpin of contemnor's argument to Judge Lasker, who rejected it.* Judge Lasker was correct.

Chestnut involved a *habeas corpus* proceeding brought by five persons who had been charged by informations with criminal contempt upon orders of the state grand jury that they be proceeded against for refusing to answer "yes" or "no" questions concerning three targets of an investigation into serious civil disturbances. This Court held that the District Court (*per* Tyler, J.) did not err in denying the petition without a hearing and found that the means by which the grand jurors in New York County were selected did not offend principles of due process and equal protection of the laws. *Id.* at 619. In commenting about Judge Tyler's refusal to consider some of the petitioners' claims by reason of the fact that the grand jury did not indict the petitioners, but merely acted as "complaining witness" upon petitioners' failure to answer, this Court disagreed with that characterization. *Id.* at 615, n.7. It was in this context that Judge Kaufman, writing for the Court, stated that the petitioners there—sentenced to terms of criminal contempt—

* Archuleta's reliance on the *Chestnut* footnote ignores the recent apothegm of Mr. Justice White in *Henderson v. Morgan*, 426 U.S. 637, 651 (1976):

"... [N]ew rules of constitutional law are not established in dicta in footnotes." (White, J., concurring).

might challenge the composition of the grand jury. The Court noted several powers of the grand jury which posited considerable discretion therein and affected "substantial interests" of the petitioners: "... the decisions to question, to grant immunity, to phrase questions in yes-or-no fashion, and finally to initiate punishment for contempt." *Id.*

In his opinion Judge Lasker ably distinguished the powers of the New York State grand jury from those of the federal grand jury:

"... [I]n federal grand jury proceedings it is the United States Attorney's office which makes the decision to seek immunity for a witness, and the court (not the grand jury) which grants immunity; the decision to move to hold a witness in contempt is also made by the United States Attorney. These limitations on the grand jury's discretion in handling a recalcitrant witness may warrant a conclusion that the witness' interest in the unbiased exercise of the federal grand jury's function is not sufficiently great to warrant his raising a challenge to its composition. (J. App., Exhibit C at 14-15).

Moreover, the questions put to Archuleta were not put in a yes-or-no fashion* and were put by the Assistant United States Attorney and not members of the grand

* Archuleta's complaint (Br. at 43, n.) that the third question asked of him—"Do you know anyone who was responsible for the bombing of Fraunces Tavern?"—was a perjury trap suggests that a witness desirous of telling the truth would not have been given the opportunity to do so. This speculation comes poorly sponsored from a witness who refused to answer any question. The complaint that the question was badly phrased is particularly surprising in light of Archuleta's failure to have so stated when the question was asked, at which time his pertinacious counsel raised every conceivable objection to the proceeding, as well as several inconceivable ones.

jury. The refusals to answer these questions became contempt only after Archuleta's refusal to obey the court's direction.* The order of contempt and subsequent incarceration, therefore, was not the result of an order by the grand jury that an information be filed upon refusal to answer one of its questions; the contempt was contempt of the court by contumacious refusal to obey one of its directions. The grand jury, and for that matter the Assistant United States Attorney, merely served the functions of giving notice that the authority of the grand jury had been flouted.** Thereafter, it was by the Assistant United States Attorney, in filing the order to show cause why the witness should not be held in contempt, that the court was given notice under the statute that "an order of the court" had not been complied with. The foregoing procedure utterly distinguishes the procedure from that followed by the grand jury in *Chestnut*.

* Judge Brieant instructed the grand jury in this regard that it was their duty only to request (not to "order," as in *Chestnut*) that the witness be held in contempt. He also instructed the jury that such a request should not be taken "lightly" but only after a careful consideration of the consequences and a thorough exercise of independent judgment. (Tr. of Proceedings June 17, 1977 at 51). The determination of contempt is confided to the District Judge and the jury was so instructed by Judge Brieant. (*Id.* 50-51). Finally, Judge Brieant cautioned that "no witness should be directed to answer a question which is unnecessary" to the work of the grand jury. (*Id.* at 51).

When the Assistant United States Attorney moved to hold Archuleta in contempt pursuant to Title 28, United States Code, Section 1826(a), the Court stated that the motion was premature until the Court's direction to answer. (*Id.* at 124A-125).

The proceedings below were consonant with the provisions of 28 U.S.C. 1826(a) in that the witness without just cause refused to comply with an order of the court, and the court, "upon such refusal, . . . [and] when such refusal was brought to its attention" held a hearing and ordered the witness confined.

** Judge T. . . s description of the grand jury as a "complaining witness", whatever its weakness in describing a state grand jury like the one in *Chestnut*, is accurate and descriptive of the federal grand jury in this regard.

Finally, the petitioners in *Chestnut* were criminal contemptors who had been convicted after trial by jury and were sentenced to terms of imprisonment for their contempts.* They could not have been released if they had decided to remit in their refusal to comply with the Court's order. The justification for the Court's order, therefore, was not coercive, but punitive, and vindicated not the powers of the Court but the interests of society. Cf. *People ex rel. Munsell v. The Court of Oyer & Terminer of the City of New York*, 101 N.Y. 274, 278-79, (1886).

The proceedings below, of course, partake of an entirely different character—*civil* contempt. The witness was ordered confined until such time as he answered questions posed to him or until the term of the grand jury expired. This distinction between civil and criminal contempt was explored in *Shillitani v. United States*, 384 U.S. 364, 368-69 (1966). The purpose of civil contempt is simply to compel the witness to answer questions validly posed to him; since "the keys of the prison [are] in their own pockets," *In re Nevitt*, 117 F. 448, 467 (8th Cir. 1902), quoted in *Shillitani v. United States*, *supra*, 384 U.S. at 368, the procedural guarantees are different than for criminal, where the guarantees are codified in Rule 42, F. R. Crim. P.

As Judge Lasker's opinion noted, at least two circuits have considered the issue posed with respect to criminal contempt in *Chestnut* in the context of federal grand jury witnesses being held in contempt and have easily distinguished *Chestnut* on the grounds adopted by Judge Lasker and urged by the Government on this appeal. *United States v. Duncan*, 456 F.2d 1401, 1403-04 (9th

* Thus, had the situation in *Chestnut* been a federal prosecution subsequent to 1968, petitioners there almost certainly could have challenged the grand jury (and petit jury, for that matter) under the statute because they would have been criminal defendants. 28 U.S.C. § 1867(a).

Cir.), *vacated on other grounds*, 409 U.S. 814 (1972); In re *Santiago*, 533 F.2d 727, 730 (1st Cir. 1976).*

Archuleta's position to raise this argument is not improved by his willful transmogrification from witness to contemnor. In *United States v. Duncan*, *supra*, 456 F.2d at 1404, the Court quoted *Blair v. United States*, 250 U.S. 273 (1919) in dispatching contemnor Duncan's challenges to the composition of the grand jury:

"On familiar principles, . . . [a grand jury witness] is not entitled to challenge the authority of the court or of the grand jury, provided they have a *de facto* existence and organization." **

* Judge Lasker's elegant reasoning that no social interests would be served well by allowing a witness to challenge the grand jury, a holding consonant with the Supreme Court's recent analyses in *United States v. Calandra*, 414 U.S. 338, 350 (1974), *United States v. Dionisio*, 410 U.S. 1, 17 (1973), and *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972), condemning "mini-trials" and "litigious interference" in the enforcement of grand jury subpoenas, needs no embellishment here. It may be found in his Opinion of May 27, 1977. (J. App., Exhibit C at 16-20).

** Although the absence of *locus standi* in this case disposes of the issues sought to be raised, it might well, but should not, escape the notice of this Court that the submissions on the part of Archuleta to prove under-representation of Hispanics and Latinos (these terms were used interchangeably without definition and without reference to one another), were so meagre as to require denial even if inspection of the jury lists under 28 U.S.C. § 1867(a), requiring a showing of "substantial failure to comply with the provisions of the act."

The affidavits of Dennis Cunningham, Esq., and others that were presented to Judge Lasker provided no facts that would have entitled Archuleta to any relief. They merely recited some of the matters shown in the Chicago proceedings and then extrapolated from that—together with extravagant assumptions about the behavior of entire groups of people and presumptions about the negligence or malfeasance by employees of the office of the jury clerk—an imaginary scenario whereby it might have been possible for Hispanic-Americans to be underrepresented on the grand jury. The affidavit of Sara Chrisman merely refers to

[Footnote continued on following page]

POINT III

Archuleta's Other Claims are Frivolous.

Archuleta claims that the order of contempt representing the culmination of the careful and reasoned findings of three district judges should be reversed because (1) the subpoena to appear before the New York grand jury was issued improperly to harass Archuleta; (2) the witness is insufficiently protected by the order of immunity entered by Judge Brieant; and (3) leaks of matters being investigated by law enforcement personnel constitute gross misconduct by the Government and thus undermine the *bona fides* of the investigation itself. These claims were found meritless by three judges in the District Court and should again be rejected. In addition, Archuleta claims that his fingerprints taken by the United States Marshal when Archuleta was incarcerated should be expunged. This argument is also without merit.

seven-year-old census records that she contended underrepresented the "Latino" community in New York State.

No specific constitutional challenges to the mode of jury selection were made by Archuleta, however, a fact best explained by the fact that reliance upon voter registration lists is expressly provided by the terms 28 U.S.C. § 1863(b)(2). Such reliance is not unconstitutional where the voter and voter registration lists themselves do not reflect discriminatory practices. See, e.g., *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); *United States v. McDaniels*, 370 F. Supp. 298 (E.D. La. 1973), *aff'd sub nom. United States v. Goff*, 509 F.2d 825 (5th Cir.), *cert. denied*, 423 U.S. 857 (1975); *United States v. Briggs*, 366 F. Supp. 1356 (N.D. Fla. 1973); *United States v. Arnett*, 342 F. Supp. 1255 (D. Mass. 1970). There was never a claim below that voter lists or voter registration lists themselves reflected discriminatory practices.

When Archuleta was sought to be held in contempt, he made no showing at all to Judge Owen that there was underrepresentation of anyone on the grand jury before whom he had refused to testify. Perhaps understandably, Archuleta did not even reallege the paltry offerings previously made to Judge Lasker.

A. The Subpoena was not Issued to Harass Archuleta

Archuleta claimed before Judge Lasker that the grand jury subpoena from the New York grand jury was improper and in bad faith for three related reasons.* First, it was an attempt to chill his First Amendment rights of association and expression. Secondly, it was an attempt to circumvent the litigation commenced by Archuleta in Chicago to avoid testifying before the grand jury, and thirdly, was unduly burdensome in any event, in compelling him to testify before two grand juries simultaneously (Br. at 28, n., 31-33, 35-36). These three grounds were urged before Judge Lasker and were rejected in a clear and thoughtful opinion. Archuleta does not even attempt to draw this Court's attention to any facts not adequately considered by Judge Lasker and later by Judge Owen to whom the matters were repeated (Tr. of Proceedings June 30, 1977 at 32-34). Archuleta fails as well to urge a point of law assertedly ignored by either judge. In short, it is impossible to divine what error occurred in these regards to justify appeal thereof to this Court.

Archuleta's contention that his First Amendment rights are being impermissibly abridged was rejected by Judge Lasker for his utter failure to make even a threshold showing of impropriety to support his claim that the aim of the grand jury in its subpoena had anything to do with Archuleta's political activities in New Mexico. This Court's opinion, *per* Friendly, J., in *United States*

* Archuleta's objection that the subpoenas were improper because they were issued by the United States Attorney through the Assistant United States Attorney in charge of the grand jury instead of the grand jury itself, is unsound. In *re Grand Jury Proceedings (Schofield I)* 486 F.2d 85, 90 (3d Cir. 1973); In *re Lopreato*, 511 F.2d 1150, 1153 (1st Cir. 1975); *cf.* 18 U.S.C. § 3322 (duty of Government attorney to report alleged violations of Federal law to the grand jury). Likewise, the right and desirability of prosecutors asking questions of witnesses before the grand jury has long been settled. *United States v. Cleary*, 265 F.2d 459, 461 (2d Cir.), *cert. denied*, 360 U.S. 936 (1959).

v. *Doe*, 457 F.2d 895, 899 (2d Cir. 1972), *cert. denied*, 410 U.S. 941 (1973)* makes it clear that

"[While] on occasion a grand jury may overstep the bounds of propriety and . . . conduct an investigation so sweeping in scope and indiscriminating in character as to offend other basic constitutional precepts . . . [a]part from such cases, when the grand jury has engaged in neither a search nor a seizure there is no justification for a court's imposing even so apparently modest requirement as a showing of 'reasonableness'—with the delay in the functioning of the grand jury that would inevitably entail."

Passing to the assertion that Archuleta's association with the National Commission on Hispanic Affairs of the Episcopal Church provided an impermissible ground for the subpoena, Judge Lasker relied on the opinion of the Honorable Lawrence W. Pierce, *In the Matter of Wood* 430 F. Supp. 41 (S.D.N.Y. 1977), where Judge Pierce found the Government and grand jury were conducting

* Archuleta's attempted distinction of *Doe* on the ground that the witness there was not directed to produce anything "testimonial in nature", *United States v. Doe*, *supra*, 457 F.2d at 900, is disingenuous. The Court there was considering whether the handwriting exemplars there commanded implicated the Fifth Amendment by being "testimonial" and thus provide the witness with a claim of privilege beyond the Fourth Amendment protection asserted by the witness. That the Court's reasoning in *Doe* is limited to the production of physical evidence may, in any event, be doubted in light of the Court's recent opinion (*per curiam*) in *In re Maria T. Cueto and Raisa Nemikin, Grand Jury Witnesses*, 554 F.2d 14, 15 (2d Cir. 1977) where the Court stated:

"It is a fundamental rule of law that the public has a right to every person's evidence. There are a small number of constitutional, common-law and statutory exceptions to that general rule, but they have been neither "lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974).

a careful, proper, and limited inquiry into the FALN bombings.* *Id.* at 47; (J. App., Exhibit C. at 25.)

Archuleta's second contention—that the grand jury subpoena was an improper attempt to bypass the morass of litigation spawned by Archuleta's challenge to his subpoena in Chicago **—was likewise carefully weighed by Judge Lasker who ably and easily distinguished the anti-trust cases, see *United States v. American Honda Motor Company*, 273 F. Supp. 810 (N.D. Ill. 1967) (company indicted in two districts for same conduct) and, civil cases (Br. at 38) relied on by Archuleta before this Court. It is obvious that grand juries in different districts inquire into crimes committed in their districts irrespective of the fact that the acts under investigation may have been committed by the same person or group.*** *In re Pilliteri*, 420 F. Supp. 913 (W.D. Pa. 1976).

Archuleta's complaint to Judge Lasker that requiring him to testify in two districts was too burdensome has necessarily been changed to a complaint that requiring him to litigate his subpoenas in two districts is too burdensome. Archuleta's complaint that he "has faced contempt citations in two districts" (Br. at 36) is raised to suggest not that Archuleta is twice a contemnor, but that the Government has been doubly abusive. Judge Lasker properly denied Archuleta's claim below on the grounds that

* Judge Pierce's finding was implicitly approved by citation of this Court thereto in *In re Cueto*, *supra*, 554 F.2d at 15, n.1.

** The contemnor also raised below the stock argument that the grand jury was seeking impermissibly to locate fugitives. Judge Lasker rejected this argument, and it has apparently been abandoned on this appeal. (J. App., Exhibit C at 27-28).

*** Judge Lasker observed with respect to this argument:

On that theory . . . it seems to me that a wisely advised terrorist group could plan incidents all over the country and later claim that they can only be called before one grand jury, which would certainly be quite an obstruction to the determination of the facts. (Tr. of Proceedings April 22, 1977 at 17).

any subpoena is a "burden" (J. App., Exhibit C at 32) and that this burden is a reasonable one in light of the social importance of a legitimate grand jury inquiry; that finding should not be obscured because of the ingenuity and resourcefulness of a battery of counsel who raised countless objections as an interminable prelude to an inevitable order of contempt.

B. The Order of Immunity Adequately Protects Archuleta

Archuleta claims that the order of immunity granted by Judge Brieant inadequately protects him because he might later be indicted in the Northern District of Illinois where he has been told he is a "possible subject" of the grand jury investigation and has been warned of his rights.* This argument may fairly be described as bogus.

Archuleta seeks here to litigate a claim only properly cognizable, if at all, in the event of an indictment in Chicago, or, for that matter, in New York or New Mexico. The Government, by seeking an order of immunity, has assumed the risk that Archuleta may forever assert this immunity as a defense to criminal charges, and the Government has assumed the "heavy burden" attendant upon that risk of proving freedom of that hypothetical indictment from the taint of that immunity. *Kastigar v. United States*, 406 U.S. 441 (1972); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964); *United States v. Nemes*, Dkt. No. 76-1584, slip op. 3509, 3516 (2d Cir. May 16, 1977). The burden of the Government is "to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar v. United States*, *supra*, 406 U.S. at 460. See *United States v. Bianco*, 534 F.2d 501 (2d Cir. 1976), *cert. denied*, — U.S. — (); *United States v. Catalano*, 491 F.2d 268 (2d Cir.), *cert. denied*, 419

* Archuleta was, in effect, given *Miranda* warnings before the grand jury in Chicago despite the fact that he, of course, has no right to refuse to answer questions, at least in the absence of timely assertion of his Fifth Amendment privilege.

U.S. 825 (1974); *United States v. Kurzer*, 534 F.2d 511 (2d Cir. 1976). If the indictment were found to have been obtained by direct or derivative use of immunized testimony, it would be subject to dismissal. *United States v. Nemes*, *supra*, slip op. at 3514, n.3; *United States v. Kurzer*, *supra*, 534 F.2d at 517.*

Archuleta relies on *United States v. Hinton*, 543 1002 (2d Cir. 1976), *cert. denied*, — U.S. — () to buttress his claim that Archuleta's Fifth Amendment privilege is jeopardized by a grant of immunity not co-extensive therewith. *Hinton* is a different horse altogether, however, as there a witness testified under immunity, gave evidence, and then was indicted by the grand jury that heard her testify. The Court there simply held, *per* Waterman, J., that the Government had not met its burden in showing a wholly independent source for the evidence upon which the grand jury voted to indict and, further, that no hearing was required because of the insuperable difficulties of showing absence of taint in the minds of grand jurors. *United States v. Hinton*, *supra*, 543 F.2d at 1009-10. The Court warned that the practice of using the same grand jury that heard the immunized testimony of the witness to indict him later for crimes about which inquiry was made, could not be countenanced.** *Id.* at 1010. This obviously dangerous practice does not bear on Archuleta's situation at all. He not only has not been indicted; he has not even testified

* Judge Briant recognized this *canard* for what it was. He stated that the issue "was not difficult at all". (Tr. of Proceedings June 16, 1977 at 20). The following day, the court ruled that any prosecution in Chicago would be tainted if any of the New York testimony given under immunity were used in Chicago. To protect against this hypothetical danger, he entered a protective order prohibiting the distribution of Archuleta's testimony to a grand jury in Chicago. (Tr. of Proceedings June 17, 1977 at 87-88).

** A grand jury may, however, indict a witness who has testified before it under immunity for criminal contempt or perjury. *Langella v. Commissioner*, 545 F.2d 818, 823 (2d Cir. 1976).

(in the sense of having given evidence) before any grand jury. To excuse Archuleta from testifying because the Government has decided his evidence is so important that he must be granted immunity to solve horrible crimes is to grant relief upon a hypothesis that has yet to define itself.

Even if Archuleta's assertions of potential abuse were meritorious, which they surely are not, the potential danger to Archuleta was erased when Judge Brieant entered a protective order at the request of Archuleta prohibiting the distribution of his testimony to the grand jury in Chicago or, indeed, to anyone other than the United States Attorney's Office for the Southern District of New York and seven named agents of the FBI, all of whom were in turn given personal service of the order. Although given the protection he sought, Archuleta has, of course, not availed himself of it. His request for further protection should now be rejected.

C. The Asserted Leaks of Information to the Newspapers do not Excuse Archuleta's Refusal to Testify

Archuleta claims finally that he ought to be excused from giving evidence before the grand jury because the *New York Times* published a story, quoting, *inter alia*, federal law enforcement sources, that identified Archuleta as a possible source of dynamite used by the FALN in New York and Chicago. This claim seeks to obscure Archuleta's own contempt by asserting without an iota of proof, contempt by persons involved in the grand jury investigation who, it is claimed, leaked grand jury matters. This argument was made to Judge Lasker, who ordered an investigation in the Southern District of New York and requested one by the Justice Department throughout the country, but who declined either to quash or to stay enforcement of Archuleta's subpoena pending

the results of the investigation. This disposition represents a sound exercise of discretion and should not be disturbed. Cf. *In re Biaggi*, 478 F.2d 489, 490, n.1 (2d Cir. 1973).

Archuleta makes much of the fact that enterprising newspaper reporters in New York and in New Mexico * were able to report coherent, if not accurate, stories containing certain information from what they termed law enforcement sources dealing with the progress and status of the investigation concerning the FALN bombings. From this assertion, Archuleta concludes on faith alone that the source of this information must be someone inside the grand jury. In response to these wild allegations, the Government submitted the affidavit of Thomas E. Engel, the Assistant United States Attorney in charge of the investigation, stating that

"no matter occurring before the grand jury and no information obtained in the grand jury investigation in New York was disclosed by anyone working in connection with the grand jury, either at the United States Attorney's Office or at the Federal Bureau of Investigation." (Supplemental Affidavit of Thomas E. Engel, filed April 26, 1977).

For purposes of deciding Archuleta's motions, however, both Judge Lasker and Judge Brieant were willing to assume a leak from the grand jury and concluded, nevertheless, that such a state of affairs afforded no relief to Archuleta. (J. App., Exhibit C at 38; Tr. of Proceedings June 17, 1977 at 83, 96-98). The proper remedy for improper disclosure is an order of contempt against the

* In addition to the article by Mary Breasted appearing in the *New York Times* on April 17, 1977, a story appeared in the *Albuquerque, New Mexico Journal* on March 12, 1977 under the byline of Winthrop Quigley containing much of the same information and concentrating on New Mexico as a possible source for FALN dynamite. (J. App., Exhibit I).

person making the disclosure. *United States v. Hoffa*, 349 F.2d 20, 43 (6th Cir. 1965), *aff'd*, 385 U.S. 293 (1966) (affirming denial of motion to dismiss indictment); *United States v. Dunham Concrete Products*, 475 F.2d 1241, 1249 (5th Cir.), *cert. denied*, 414 U.S. 832 (1973) (affirming denial of motion to dismiss indictment); *United States v. Schiavo*, 375 F. Supp. 475, 478 (E.D. Pa.), *aff'd*, 506 F.2d 1053 (3d Cir. 1974) (denying motion for new trial); *United States v. Smyth*, 104 F. Supp. 283, 293 (N.D. Cal. 1952) (denying motion to dismiss indictment).

The investigation ordered by Judge Lasker in the Southern District of New York has been received by Judge Lasker, and the Attorney General has directed that the FBI investigate the source of the leaks on a national basis. These remedies adequately vindicate the interest of grand jury secrecy.*

D. Fingerprinting and Photographing Archuleta Deprived him of no Substantial Rights

Archuleta seeks to have his fingerprints and photographs—taken upon his incarceration pursuant to the order of civil contempt—expunged. He claims that such action should be taken to protect his rights in the Northern District of Illinois despite the fact that an order dated December 16, 1976 compelling production of his fingerprints pursuant to grand jury subpoena has already entered there *per* Chief Judge Parsons. Even in the absence of such an order, however, there would be no merit to this claim. It is well-established that physical evidence such as fingerprints, voice or handwriting exemplars may be compelled from grand jury witnesses for identification purposes without offending Fourth or Fifth Amendment rights, *United States v. Dionisio*, 410 U.S. 1

* Archuleta's complaint that he has not been made privy to Mr. Fisks's report indicates only that he has not consulted the files in this case.

(1972); *United States v. Mara*, 410 U.S. 19 (1972); *United States v. Doe*, 457 F.2d 895 (2d Cir. 1972), *cert. denied*, 410 U.S. 941 (1973). Moreover, as Archuleta concedes (Br. at 9), his fingerprints are already in the hands of the FBI by virtue of a 1975 federal arrest. Assuming *arguendo*, therefore, that Archuleta had a right still to challenge the order of Judge Parsons in Illinois, his position has in no way been prejudiced by the taking of his fingerprints in the Southern District of New York.*

* Archuleta's attempts to bolster his position by claiming that his fingerprints were taken in violation of the United States Marshal's Manual § 613 which states that "persons arrested on civil process should not be compelled to submit to fingerprinting if they object." (Br. at 64). Assuming that Archuleta's incarceration constitutes an arrest on civil process, it may scarcely be asserted that a violation of this guideline amounts to such a gross violation of agency regulations as to constitute a denial of due process, see *United States v. Capra*, 372 F. Supp. 609, 612 (S.D. N.Y.), *rev'd in part on other grounds*, 501 F.2d 267 (2d Cir. 1974); *Otero v. New York City Housing Authority*, 344 F. Supp. 737, 745 n.13 (S.D.N.Y. 1972), *rev'd on other grounds*, 484 F.2d 1122 (2d Cir. 1973), especially in view of the utterly routine nature of fingerprinting and photographing persons arrested or otherwise in custody. Cf. *United States v. Smith*, 393 F.2d 687 (6th Cir.), *cert. denied*, 393 U.S. 885 (1968).

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

THOMAS E. ENGEL,
FREDERICK T. DAVIS,
*Assistant United States Attorneys,
Of Counsel.*

